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Nos. ~~72~~ 87, 290, 291

Supreme Court of the United States

OCTOBER TERM, 1947

~~J. D. Shelley, et al., *Petitioners*,~~

v.

~~Louis Kraemer, et al.~~

Orsel McGhee and Minnie S. McGhee, his wife, *Petitioners*,

v.

~~Benjamin J. Sipes, and Anna C. Sipes, James A. Coon and Addie A. Coon, et al.~~

James M. Hurd and Mary I. Hurd, *Petitioners*,

v.

Frederic E. Hodge, et al.

Raphael G. Urciolo, Robert H. Rowe, Isabelle J. Rowe, et al., *Petitioners*,

v.

Frederic E. Hodge, et al.

ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF MISSOURI AND MICHIGAN AND THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

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IN THE

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~~J. D. SHELLEY, et al., *Petitioners,*~~

~~v.~~

~~LOUIS KRAEMER, et al.~~

ORSEL MCGHEE and MINNIE S. MCGHEE, his wife, *Petitioners,*

v.

BENJAMIN J. SIPES, and ANNA C. SIPES, JAMES A. COON and ADDIE A. COON, et al.

JAMES M. HURD and MARY I. HURD, *Petitioners,*

v.

FREDERIC E. HODGE, et al.

RAPHAEL G. URCIOLO, ROBERT H. ROWE, ISABELLE J. ROWE, et al., *Petitioners,*

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BRIEF OF THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

The American Jewish Congress, an organization consisting of thousands of Americans of Jewish faith and ancestry, respectfully submits this brief *amicus curiae* in the above entitled cases. Consent to the filing of this brief has been obtained from counsel for petitioners and respondents in all four cases.

Interest of the American Jewish Congress

The American Jewish Congress was organized in part "* * * to safeguard the civil, political, economic and religious rights of Jews everywhere" and "* * * to help preserve, maintain and extend the democratic way of life".

In the three decades of its existence the American Jewish Congress, on frequent occasions, has represented the democratic interests of the Jewish people before the courts, legislatures and administrative tribunals of the State and Federal governments. Its work, however has never been confined to the interests of the Jewish people alone. It has believed, indeed, that Jewish interests are threatened whenever persecution, discrimination or humiliation are inflicted upon any human being because of his race, creed, color, national origin or ancestry.

A racial restrictive covenant imputes inferiority to the members of the racial or ethnic minority group covenanted against. An attempt to obtain what is in effect recognition of that imputation by suit for judicial enforcement of the covenant is of great moment to all minorities. For these reasons the American Jewish Congress is deeply concerned with the outcome of these cases and is impelled to submit this brief *amicus curiae*.

Statement

These are four suits, the common purpose of which is to enforce by injunction certain arrangements entered into by

former owners of real property in the cities of St. Louis, Detroit and Washington, D. C., pursuant to which such owners agreed to bar the sale to or occupancy by Negroes of such property. In all four cases the purpose of the respective agreements was to maintain the respective communities which they affected as white residential neighborhoods by preventing Negroes from living in such communities.

Shelley v. *Kraemer*, No. 72, involves a community located in St. Louis. The covenant was entered into in 1911 and was to be effective for fifty years. The agreement prohibited sale or occupancy by any person not of the Caucasian race under penalty of forfeiture of the property.

In *McGhee* v. *Sipes*, No. 87, the restrictive covenant prohibited use or occupancy of property in Detroit by non-Caucasians without specifying a penalty. Entered into in 1934 the agreement was to continue in effect for twenty-five years. The purpose of the restriction, as recited in the instrument imposing it, was "defining, recording and carrying out the general plan of developing the subdivision which has been uniformly recognized and followed".

Hurd v. *Hodge*, No. 290, and *Urciolo* v. *Hodge*, No. 291, involve property located in Washington, D. C. The covenant under attack in these cases prohibited sale to any Negro or colored person under penalty of forfeiture of $2,500. The agreement was entered into in 1906 and was perpetual.

In all cases, the property in litigation has been sold by white persons to Negroes for their use and occupancy. In each case an action to enjoin the use or occupancy by the Negro purchaser has been brought by another signer to the agreement or his successor in interest.

In the Missouri and District of Columbia cases, the plaintiffs demanded that the transfer be cancelled and that the Negro purchasers be restrained from occupying the premises. In the Michigan case, where the covenant prohibited use or occupancy only, plaintiffs demanded that the Negro owner be evicted from the property he had purchased.

In the St. Louis case, the defendant Negro purchasers were successful in the trial court on a non-federal ground, but the judgment was reversed on appeal and it was directed that the relief sought by the plaintiffs be granted. In the Detroit case, the decree of the trial court granting the relief sought by the plaintiffs was affirmed on appeal. In the Washington, D. C., case, the decree of the trial court granting the relief sought by the plaintiffs was affirmed by the Court of Appeals, Justice Edgerton dissenting.

The Issues to Which This Brief Is Addressed

Our brief is limited to the most fundamental question involved in these cases: whether enforcement of the covenants by courts of the District of Columbia and the States violates the due process clause of the Fifth and Fourteenth Amendments and the equal protection clause of the latter.

Summary of Argument

I. The constitutional restraints on governmental action apply to all branches of the government including the judicial. Judicial action has been held subject to constitutional restraint in both its procedural and its substantive aspects.

Enforcement of restrictive covenants involves the full authority of the State. The compulsion exercised differs in no constitutionally significant way from other forms of state action.

IIA. The Constitution creates a right against racial or religious discrimination by State or Federal governments. Although the right thus protected must be measured against other rights which conflict with it, the only superior right which this Court has ever recognized is the right of the nation in wartime to protect its existence.

IIB. The State and Federal governments, in their proper spheres, may prevent discriminatory acts by private individuals. So long as the discrimination remains in the

area of voluntary individual action, the Fifth and Fourteenth Amendments have no application. Where, however, the discriminatory decisions of individuals are effectuated by state action, constitutional restraints apply, since the Amendments prohibit state action, in any form, which compels discrimination by individuals against each other.

IIC. Not only the policy against government discrimination but also the policy of enforcing contracts are part of all State and Federal legal systems. The general law of contract enforcement may be and is limited in varying respects by each government. Hence, it makes no difference, from a constitutional point of view, whether restrictive covenants are enforced because of refusal by a State to make an exception from its general rule or because of a specific statute giving them validity. Similarly, no constitutional distinction can be made between enforcement pursuant to common law and enforcement under a statute. Finally, it makes no constitutional difference that the discrimination which is effected is initiated by an individual and put into effect by the court's application of a general rule. The decisive fact is that there is no effected discrimination until the court bases its decision on the race or religion of the parties before it.

IID. Familiar constitutional principles of accommodation supply the basis for resolving the conflict which exists here between the policy of governmental non-discrimination and the policy of enforcing contracts. The legitimate claims of the latter must be weighed against those of the former, taking into consideration not only the importance of each policy but also the extent to which each is threatened with impairment.

III. The restrictive covenant device has prevented normal expansion of minority groups into new neighborhoods and has thereby generated the social evils of crime, disease, prostitution and unrest. Accompanying these evils is a dangerous despair and disbelief in democratic values.

The wide use of restrictive covenants also has the effect of forcing white Christian buyers to accept a practice which may be repugnant to them. Thus the judicially enforced covenant, by establishing discriminatory patterns, breeds new prejudices which would not otherwise come to life.

Court enforcement of restrictive covenants has a direct effect on the excluded purchasers which is offensive to constitutional principles. Housing is a necessity of life without which all other constitutional rights lose their value.

Finally, in granting enforcement of restrictive covenants, courts sanction an even more effective discriminatory device than that which is prohibited in legislation.

In view of the evils which enforcement of restrictive covenants thus generates, the considerations in favor of general enforcement of contracts are clearly outweighed by the need for protecting the right of all men to be free of unjust racial and religious discrimination by State and Federal governments.

ARGUMENT

POINT I

The action of a court in enforcing a contract is government action which is subject to the limitations of the Fifth and Fourteenth Amendments to the Constitution.

In one of its earliest decisions implementing the broad principles of the Fourteenth Amendment, this Court held, in 1880, that the prohibitions of the Fourteenth Amendment "have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities." *Ex parte Virginia*, 100 U. S. 339, 346-347 (1880). Thereafter, in the *Civil Rights Cases*, 109 U. S. 3 (1883), in which the scope of the

Amendment was again carefully reviewed, this Court excluded from operation of the Amendment only those "wrongful acts of individuals, [which are] unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings" (109 U. S. at 17). During the intervening 64 years this Court has on many occasions found it necessary to determine whether "state action" was present in a particular case before it determined whether the action invaded rights protected by the Fifth or Fourteenth Amendments.

All "procedural" actions of the judiciary have been held to be "state action". This includes both court rules of procedure (*Pennoyer* v. *Neff*, 95 U. S. 714 [1878]), and actual procedural steps taken in particular cases without benefit of court rule (*Powell* v. *Alabama*, 287 U. S. 45 [1932]).

On the substantive side, this Court has also held that judicial action in punishing for a contempt of court is "state action" (*Bridges* v. *California*, 314 U. S. 252 [1941]). Judicial punishment for a recognized common law crime has been declared "state action" (*Cantwell* v. *Connecticut*, 310 U. S. 296 [1940]), as has an injunction directed against a common law tort to protect *private* interests (*A. F. of L.* v. *Swing*, 312 U. S. 321 [1941]; *Milk Wagon Drivers* v. *Meadowmoor*, 312 U. S. 287 [1941]).

This Court has not, to counsel's knowledge, ever passed upon the question whether court action in enforcing a contract is "state action", the question presented in this case.[1]

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[1] We do not discuss here the dictum of this Court in *Corrigan* v. *Buckley*, 271 U. S. 323 (1926), which is often cited in opposition to the position which we take. We consider the granting of the petitions for certiorari in these cases sufficient indication that this Court does not view that decision as being decisive of the present issue. We respectfully refer the Court to the dissenting opinion of Justice Edgerton in *Hurd* v. *Hodge*, ... F. 2d ..... (App. D. C., 1947), for an analysis of *Corrigan* v. *Buckley*. We respectfully urge further that, if this Court should find that any portion of the decision in the *Corrigan* case supports the position taken by respondents here, it should hold that, in the light of recent developments in the interpretation of the Constitution, that portion should be overruled.

We submit, however, that it does not require elaborate argument to support the conclusion that "state action" is present in such cases.

Restrictive covenant litigation does not arise until private persuasion of the owner of the subject property has failed. Plaintiffs' efforts here to obtain mandatory injunctions are in every sense attempts to coerce the property owners and the Negro purchasers by the fullest invocation of the State's compulsory machinery—injunction, contempt proceedings, jail or fine for contempt and probably forcible eviction by the sheriff as well.

Certainly the actions taken by the judiciary in the present cases differ in no constitutionally significant way from other forms of state action. The decrees enforcing the restrictive regulation are backed by the contempt powers of the court. The parties to whom they are addressed are compelled to comply by the threat of fines limited in amount only by judicial discretion and by imprisonment continuing indefinitely until compliance. This is a far more effective device for invoking the full powers of the government than that invoked in many of the cases, involving minor penal laws and even lesser regulations, in which this Court has granted protection under the Constitution.

In sum, where a State uses its power to compel or restrain acts by private individuals, it makes no difference which branch of the government exercises the compulsion. As we shall now show, the decisive question in these cases is whether the freedom from governmental discrimination which the court action infringes is of such a nature as to have a superior claim to protection over the right of governments under their plenary powers, to enable individuals to dispose of their own affairs by contract.

POINT II

The constitutionality of court enforcement of a contract requiring racial or religious discrimination must be determined by resolving the conflict between the considerations against such discrimination by governments and the considerations in favor of implementation by government of the freedom of action by private individuals.

A. The constitutional restraint on governmental racial and religious discrimination.

This Court held as early as 1886 that governmental discrimination prompted solely by "race and nationality . . . in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution" (*Yick Wo* v. *Hopkins*, 118 U. S. 356, 374 [1886]). This thought was vigorously restated by this Court with reference to the Fifth Amendment in *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943):

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.

Like all other constitutional rights, however, the right to be free from racial or religious discrimination by the State must be measured against other rights, where they conflict. Where the government itself initiates and imposes distinctions, it is our position that there is no situation in which any legitmate demand of the people on the State would justify distinctions based on race or religion. However, this Court did find such a justification in the *Hirabayashi*

case, *supra*; and in *Korematsu* v. *United States*, 323 U. S. 214 (1944), where it approved regulations restricting American citizens of Japanese ancestry because of an immediate wartime emergency. It found that there was a danger of sabotage and espionage which might assist an enemy invasion, a danger created by the existing social and legal restrictions placed on persons of Japanese ancestry which had prevented their complete integration as part of the general population. This Court made clear, however, that although "Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can" (*Korematsu* case, 323 U. S. at 216). Short of such an unusual situation, regulations establishing "discriminations based on race alone are obviously irrelevant and invidious" (*Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 203 [1944]).

In *Buchanan* v. *Warley*, 245 U. S. 60 (1917), this Court held that the Fourteenth Amendment, as well as 8 U. S. C. 42 (14 Stat. 27), forbids state action aimed at segregation of races in the use and enjoyment of land, and specifically rejected the argument that such state-imposed segregation was justified by the need to preserve the public peace. That case involved the validity of a municipal ordinance which in substance forbade Negroes to occupy property in predominantly white areas and *vice versa*. This Court held the ordinance void, saying (at 78-79):

> The statute of 1866, originally passed under sanction of the Thirteenth Amendment, 14 Stat. 27, and practically reenacted after the adoption of the Fourteenth Amendment, 16 Stat. 144, expressly provided that all citizens of the United States in any State shall have the same right to purchase property as is enjoyed by white citizens. Colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color. *Hall* v. *DeCuir*, 95 U. S. 485, 508.

It quoted with approval the conclusion, reached by a State court in a similar case, that (at 80):

> The effect of the ordinance under consideration was not merely to regulate a business or the like, but was to destroy the right of the individual to *acquire, enjoy, and dispose* of his property. Being of this character, it was void as being opposed to the due process clause of the constitution. (Emphasis added.)

The decision in the *Buchanan* case gave full weight to the argument that "there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration" (245 U. S., at p. 80). It was held nevertheless, that this consideration was insufficient to warrant "depriving citizens of their constitutional rights and privileges" (*id.*, at pp. 80-81).

Following *Buchanan* v. *Warley*, this Court brushed aside an attempt to circumvent that decision by combining voluntary private action with the state regulation.[2] It thereby clearly established the principle that States *may not impose racial segregation in housing upon property owners.*

B. The limited area of freedom of individuals to discriminate.

Both State and Federal governments have wide powers to prohibit discrimination by private individuals. Each, in its appropriate sphere, may make reasonable regulations curbing the freedom of individual choice in order to achieve legitimate public ends. Thus, States may prohibit discrim-

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[2] *Harmon* v. *Tyler*, 273 U. S. 668 (1927). The case involved a New Orleans ordinance which barred whites or Negroes from any "community or portion of the city * * * except on the written consent of a majority of the opposite race inhabiting such community or portion of the city." (See *Tyler* v. *Harmon*, 158 La. 439, 441.) This ordinance was held unconstitutional by this Court in a per curiam opinion relying upon the authority of *Buchanan* v. *Warley*. See also *Richmond* v. *Deans*, 281 U. S. 704 (1930).

ination, for example, in places of public accommodation,[3] and the Federal government may also do so in the exercise of its power to regulate interstate commerce.[4]

Regulations such as those described above do not rest upon the prohibitions of the Fifth and Fourteenth Amendments. They deal with discriminatory activity in the area of voluntary individual action. This is the sole area which, under the decisions of this Court, lies outside the scope of the Amendments.

The *Civil Rights Cases*, 109 U. S. 3 (1883), which established the inapplicability of the Fourteenth Amendment to "private action", involved a Federal statute requiring non-discriminatory treatment on account of race or color in specified types of public accommodations, with violations criminally punishable.

This Court struck down the statute because "it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, *without referring in any manner to any supposed action of the State or its authorities*" (109 U. S. at 14; emphasis supplied).

The area which was thus excluded from the operation of the Fourteenth Amendment was carefully delineated in the decision. It was held that the rights protected by the Amendment are "secured by way of prohibition against State laws and State proceedings affecting those rights" (at 11). The scope of the decision was narrowly limited to the situation where "the wrongful acts of individuals [are] unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings" (at 17).

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[3] Many States have statutes prohibiting racial and religious discrimination by stores, restaurants, theatres and similar enterprises which serve the public generally. This Court has upheld a statute which prohibits racial and religious discrimination by labor unions in the admission of members. *Railway Mail Association* v. *Corsi*, 326 U. S. 88 (1945).

[4] *Mitchell* v. *U. S.*, 313 U. S. 80 (1941).

The Amendment was held inapplicable only where individual action was "not sanctioned in some way by the State, or not done under State authority" (*ibid.*). The individual was held free of the constitutional restraint on discrimination "unless protected in [his] wrongful acts by some shield of State law or State authority" (*ibid.*). See *Hale, Rights under the Fourteenth and Fifteenth Amendments against Injuries Inflicted by Private Individuals,* 6 Lawyers Guild Rev. 627 (1946).

But while the Fifth and Fourteenth Amendments do not restrain individual voluntary discrimination, they do restrain state action which requires individual acts of discrimination; under the Amendments, individuals may demand that the government refrain from compelling discrimination by others with whom they may deal. That was indeed the nature of the right defined by this Court in *Truax* v. *Raich,* 239 U. S. 33 (1915), and, somewhat less explicitly, in *Buchanan* v. *Warley,* 245 U. S. 60 (1917).

The *Truax* case was a successful suit by an alien to invalidate a State statute limiting the employment of aliens by private employers. This Court said (239 U. S. at p. 38): "The employé has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion * * *."[1] When it held that the statute violated the equal protection clause, this Court was protecting the alien's right to an independent decision by the employer whether or not to hire him. The parallel with the sale of land is clear: the seller (employer) is free to but need not sell to (hire) the Negro or Jew (alien).

Buchanan v. *Warley* involved a city ordinance prohibiting Negroes from moving into blocks where the majority of homes were occupied by whites, and *vice versa.* This Court said (245 U. S. at p. 81): "The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person." Here the Court was protecting the

seller's right to make an independent decision, even though such a decision might have had the same ultimate effect as the ordinance—refusal to sell to a Negro.

In both cases, the constitutional right invaded was the right to freedom from a State-compelled discriminatory decision. This is the very right which is invaded by court decrees in restrictive covenant litigation.

This Court in first interpreting the Fourteenth Amendment could have held that it created an absolute right to non-discrimination and could have established a corresponding constitutional protection against "private action". Even as limited by the *Civil Rights Cases*, however, the thrust of the Amendment toward equal rights for all men was considerable. It struck down State *compulsion* of discrimination with its attendant imbedding of prejudice. True, the resulting rule leaves individual acts of prejudice untouched, but at least educational, economic and social forces have a chance to be more effective if individual decisions cannot be petrified by laws or courts. By requiring that each act of discrimination be a fresh act of prejudice, the Amendment forces individual prejudice to sustain itself.

C. The implications of governmental enforcement of private contracts.

The constitutional restraint upon racial and religious discrimination by governments is necessarily a part of the legal system of every State as well as the Federal union. Governments also have another policy embedded in their law, that of permitting individuals to make contracts concerning their property and affairs and of enforcing such contracts through the courts. Centuries of experience have justified this law. It is necessary to the functioning of our economy that individuals be empowered to plan their affairs jointly for the future, and to put such joint plans beyond the reach of unilateral amendment. This is indeed not only a legitimate but an essential objective of State action.

Like all general laws, the policy of enforcing contracts has its exceptions. States may and do declare some contracts unenforceable. They may be held contrary to public policy or general provisions of State constitutions. They may be excluded from the general enforcement rule by specific legislation.[5]

When a State so limits its general law it unquestionably makes a deliberate, *conscious* decision. To the same extent the State acts consciously when its legislature fails to exclude other types of contract from its general enforcement law, or when its courts, refusing to find that enforcement of such contracts is illegal or contrary to public policy, grants their enforcement.

Such enforcement is neither automatic nor purely administrative. If the restrictive covenants in these cases had been enforced pursuant to statutes specifically making such covenants enforceable, there could be no doubt about the existence of "state action". Enforcement in the absence of statute is "state action" to the same extent.

Determination of the consitutionality of a rule of law does not depend on whether it rests on statute or judicial decision. This Court has previously drawn no distinction for constitutional purposes between legislation and common law rules of similar purport. Enjoining picketing as a tort has been treated as "state" action whether the tort was governed by statute or common law. Cf. *AFL* v. *Swing*, 312 U. S. 321 (1941), and *Truax* v. *Corrigan*, 257 U. S. 312 (1921); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940). We do not believe any different result would have been reached by this Court in *Marsh* v. *Alabama*, 326 U. S. 501 (1946), discussed below, if the trespass had there been punished as a common law crime rather than as a statutory offense, or even if it had been dealt with in the State court by injunctive action or in a civil suit for damages.

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[5] For example, a Minnesota statute (Minn. Stat. Ann., Sec. 507.18) provides that no instrument relating to real property may contain a restriction prohibiting conveyance to any person because of religion.

Finally, it makes no difference that the racial discrimination here was initiated by private individuals and was enforced by the courts below in accordance with general non-discriminatory law. The discrimination was ineffective without State aid. Not until the courts below looked at the race of the parties before them and based the outcome of the litigation on the result of that examination did there occur any interference with constitutional liberties. That is the essence of the governmental discrimination here challenged. "Delegates of the State's power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black" (*Nixon* v. *Condon*, 286 U. S. 73, 89 [1932]).

The irrelevance of the private origin of discrimination which is imposed by the State is established by the decisions of this Court in *Marsh* v. *Alabama*, 326 U. S. 501 (1946); *Smith* v. *Allwright*, 321 U. S. 649 (1944), and *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U. S. 192 (1944). Each of these cases involved the application of general, non-discriminatory and otherwise valid law in a manner which unconstitutionally effectuated the decisions of private agencies.

In the *Marsh* case, the proprietors of a company-owned town, who owned in fee all of the land in the town including the streets, denied Marsh access to such streets when she sought to go upon them for the purpose of distributing religious literature. Marsh, having refused to leave these "private" premises, was convicted of violating a local statute which, in general terms, made trespass after warning a crime. This Court held that the conviction was State action in violation of the guarantees of the Fourteenth Amendment.

The gist of this decision was that the legal system of Alabama must in some way permit religious freedom in company-owned towns. This Court was in no way hampered by the fact that the law under which the company's discrimination was made effective was a general one which made no specific reference to company-owned towns or to religious activities and which, in its ordinary applica-

tion, was unquestionably valid. By legislation or judicial decision, Alabama might have provided the freedom which this Court held essential or it might have specifically denied that freedom. Its disposition of the matter, instead, under general principles, did not prevent this Court from holding that that aspect of its law which enabled private citizens, with State aid, to limit freedom of speech or religion was unconstitutional.

In *Smith* v. *Allwright, supra,* the law of Texas provided that the ballot in state-conducted elections list the names of persons chosen by political parties and specified to some extent the manner in which the parties were to select these nominees. The State Convention of the Democratic Party of Texas excluded Negroes from its membership and hence from participation in the Democratic Party. This Court held that despite the Texas law and the action of the Democratic Party, a Negro could not be refused a ballot in the Democratic primary. It made no difference that there was nothing discriminatory about the State statute itself or that the discrimination originated with a private organization. It was decisive that operative effect was given to the private discriminatory membership rule by Texas law. By giving such effect in its electoral process to the choice made by an otherwise private agency, the State made that choice subject to constitutional restraint.

The application of this doctrine to discriminatory contracts was dealt with by this Court in the *Steele* case, a suit by a Negro railroad employee to enjoin the enforcement of a discriminatory agreement between a union and his employer. The general majority rule principle of the Railway Labor Act made the union the exclusive bargaining representative for the craft of which the plaintiff was a member and, by no more than implicit incorporation of the general law of contract enforcement, made the contract executed by that union enforceable against the minority in court. This Court held (323 U. S. at p. 198):

> If the Railway Labor Act purports to impose on petitioner and the other Negro members of the craft the legal duty to comply with the terms of a contract

> whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, we must decide the constitutional questions which petitioner raises in his pleading.

Here again, the discrimination was private in origin and raised questions of constitutional restraint only because of the general non-discriminatory law which gave it effect.

Here, the governments whose actions are under review have in effect told the owners of land within their jurisdiction that they may adopt regulations, prompted by purely private considerations, which contain discriminatory restrictions on the future disposition of their land, and that, if they do so, the courts will give these regulations the effect of law, an effect which they could not have without state action. We submit that a law, however expressed, which embodies this policy, must necessarily be tested against the restraints imposed by the constitution on governmental action. Where private individuals engage in discriminatory conduct, and the State "enforces such action" (*Marsh* case, *supra*, at p. 508), or makes such action "part of the machinery" of its functioning (*Smith case, supra*, at p. 664), or requires other individuals to conform to the contractual discriminatory pattern thus established (*Steele* case, *supra*), the state action may be challenged.[6]

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[6] Of course, proceedings to enforce private contracts rarely raise constitutional issues. Just as the vast bulk of State and Federal regulatory legislation raises no questions under the Fifth or Fourteenth Amendments although it is manifestly "state action", so most judicial enforcement of contracts contains no indication of interference with constitutional guarantees. Moreover, contracts which would be likely to be held to violate a constitutional right rarely reach a decision on the constitutional question because courts invoke doctrines of "public policy" to refuse enforcement. If, however, a State court were willing, as a matter of public policy (purely a State question), to enforce a contract to commit a crime, it is most likely that this Court would hold such enforcement to be an unconstitutional denial of substantive due process, thus treating the enforcement of contracts as "state action". State public policy doctrines may obviate the need for dealing with the constitutional question in most such cases but they cannot affect the existence of residual constitutional protection.

D. The conflict between the policies of non-discrimination and contract enforcement.

The policy against governmental discrimination and the policy of enforcing private contracts may conflict, as they do here. Where such a conflict arises, familiar principles control the process of "weighing the two conflicting interests".[7] It is well established, for example, that freedom of speech, press, religion and assembly may be limited in favor of the right of the people to protect the state,[8] public order,[9] child welfare,[10] and morality.[11]. In such cases, the States in the first instance, and ultimately the courts reviewing their action, must perform the task of "balancing these interests against the interest of the community and that of the individual in freedom of discussion on matters of public concern".[12]

It is not only the relative importance of the objectives of the two policies which must be considered but also the extent of the threatened impairment of each. "In every case the power to regulate must be so exercised as not, in attaining a permissible end, *unduly* to infringe a protected freedom." (Emphasis supplied.)[13] It is only those "in-

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[7] *Cantwell* v. *Conn.*, 310 U. S. 296, 307 (1940) (statute requiring prior approval of solicitation for religious purposes); *Martin* v. *Struthers*, 319 U. S. 141, 143 (1943) (prohibition of door to door distribution of circulars).

[8] *Schenck* v. *U. S.*, 249 U. S. 47 (1919) (conviction under Espionage Act for distributing literature obstructing draft); *Gitlow* v. *N. Y.*, 268 U. S. 652 (1925) (statute prohibiting advocacy of criminal anarchy).

[9] *Cox* v. *New Hampshire*, 312 U. S. 569 (1941) (application to religious procession of statute requiring permit for parades).

[10] *Prince* v. *Mass.*, 321 U. S. 158 (1944) (application to religious activity of statute regulating child labor).

[11] *Reynolds* v. *U. S.*, 98 U. S. 145 (1878) (polygamy).

[12] *Thornhill* v. *Alabama*, 310 U. S. 88, 105 (1940) (statute prohibiting picketing).

[13] *Cantwell* case, 310 U. S. at 304. See also *Cox* v. *New Hampshire*, 312 U. S. 569, 574: "unwarrantedly abridged the right of assembly".

admissible" obstacles which "unreasonably obstruct" dissemination of views which are prohibited.[14] Thus, utterances may be barred where they "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality".[15] "And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."[16]

Implementation of freedom of private contract is, as we have shown (*supra*, p. 14), a legitimate objective of government. But, as this Court has put it, "Ownership does not always mean absolute dominion" (*Marsh* case, *supra*, at p. 506). It is necessary to strike a balance between the constitutional policy forbidding racial discrimination and the policy protecting the individual's free use of his private property.

In the *Marsh*, *Smith* and *Steele* cases, *supra*, where public sanction for private discrimination was involved, the constitutional issues were resolved by just such a balancing of the conflicting considerations. Thus, in the *Marsh* case, this Court said (326 U. S. at p. 509):

> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.

The conclusion reached by this Court in the three cases was that governments cannot rely on considerations in favor of freedom of private action, private association or

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[14] *Cantwell* case, 310 U. S. at 305.

[15] *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942) (statute prohibiting offensive or derisive language).

[16] *Schneider* v. *State*, 308 U. S. 147, 161 (1939) (statute prohibiting distribution of literature on streets).

contract as justification for substantial impairment of such basic constitutional freedoms as the right to espouse religious causes, the right to vote and the right to earn a living. In the instant cases, the courts below have sustained State and Federal enforcement of private discrimination which substantially impairs the right to dispose of, own and occupy property and particularly a home. We shall now show that in doing so they have sanctioned an unjustifiable impairment of a constitutionally protected right.

POINT III

The constitutional right to own and occupy property without racial or religious discrimination by State or Federal governments is impaired by judicial enforcement of racial and religious restrictive covenants.

These proceedings to enforce racial restrictive covenants are part of a nation-wide effort to maintain and extend ethnic patterns in the ownership and occupancy of homes. While ostensibly concerned with the ownership or occupancy of a single parcel of land, every restrictive covenant case involves directly the racial characteristics of a contiguous group of parcels, a city block, or even a major residential area. In the cases at bar, as in all restrictive covenant cases which counsel has examined, the decree is sought by the owners of neighboring property who seek to interfere with a sale by a willing seller to a willing buyer.

Plaintiffs are not merely seeking to regulate the occupancy of one piece of property but are seeking rather to preserve control over an entire area. Unless they can achieve dominion in an appreciable section, control over a single plot is worthless. Thus, an essential characteristic of the covenant device is its uniform application to multiple units of land; only such application can achieve the sole purpose of the covenant—establishment and preservation

of a racial or religious pattern for a neighborhood. Covenants thereby achieve the same objectives as a zoning ordinance, with the restrictions based not on the use to which the property may be put but upon the ethnic groups of the occupant.

If a court may not constitutionally enforce the covenant in question, the owner of the property will be free to sell or lease to whomever he chooses. He may or may not elect to sell to a member of the proscribed class. The Negro or Jewish buyer will be free to enter the market and his chance of obtaining housing will depend solely on his ability to influence a given seller. He may or may not succeed in persuading the seller but at least he will have a chance of success. The seller's neighbors will lose their power to censor the occupancy of the property and will lose whatever imagined psychological security they derive from not dwelling near members of the proscribed race. However, they, too, will now be free to sell or lease to members of the proscribed class.

If, however, a court may constitutionally enforce the covenant, owners of land will continue to have power to veto candidates for occupancy of property other than their own. The owner of the property will lose as potential customers the members of the proscribed class; the members of the proscribed class will lose all opportunity to acquire covenanted property from willing sellers. This impediment to their securing housing will increase directly as the covenanted area in a given community increases.

Because the restrictive covenant device is concerned with continuing and maintaining the racial characteristics of whole neighborhoods, the prevalence of such covenants has been a major factor in preventing the normal expansion of minority groups into new neighborhoods. In the past three decades, there has been a major migration of Negroes from the South to the cities of the North and West. As the Negro population of a community has grown, the prevalence of the covenant has kept step. The result has

been to force Negroes to enter and remain in segregated, overcrowded areas—in Harlems and other Black Belts.

The segregation and overcrowding which have resulted from the restrictions imposed by racial covenants have serious social consequences. It is today a commonplace that the major social evils of crime, disease, prostitution and unrest have deep roots in the ghetto system under which many of our minority groups are forced to live. The picture is graphically presented by the recent report of the President's Committee on Civil Rights, "To Secure These Rights" (Gov. Print. Off., 1947), pp. 68-69:

> Through these covenants large areas of land are barred against use by various classes of American citizens. Some are directed against only one minority group, others against a list of minorities. These have included Armenians, Jews, Negroes, Mexicans, Syrians, Japanese, Chinese and Indians.
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> While we do not know how much land in the country is subject to such restrictions, we do know that many areas, particularly large cities in the North and West, such as Chicago, Cleveland, Washington, D. C., and Los Angeles, are widely affected. The amount of land covered by racial restrictions in Chicago has been estimated at 80 percent. Students of the subject state that virtually all new subdivisions are blanketed by these covenants. Land immediately surrounding ghetto areas is frequently restricted in order to prevent any expansion in the ghetto. Thus, where old ghettoes are surrounded by restrictions, and new subdivisions are also encumbered by them, there is practically no place for the people against whom the restrictions are directed to go. Since minorities have been forced into crowded slum areas, and must ultimately have access to larger living areas, the restrictive covenant is providing our democratic society with one of its most challenging problems.[17]

Accompanying these evils are a dangerous despair and disbelief in democratic values. "It is not at all surprising,"

[17] The prevalence of restrictive covenants in the District of Columbia is discussed separately in the Report at pages 91-92.

says the President's Committee (at p. 146), "that a people relegated to second-class citizenship should behave like second-class citizens." In striking down restrictive covenants, this Court will be taking a major step toward amelioration and, it is hoped, ultimate ending of the evils resulting from segregated housing.

Less well recognized is the degree to which the covenant restricts the choice of the white buyer. As the use of the covenant grows in a given community, the white Christian buyer, like the Negro or Jewish buyer, can no longer find uncovenanted property. If he wants land, he must accept the covenant no matter how repugnant it may be to him. He cannot bargain about it.

The white Christian buyer thus finds himself saddled with a contract of exceptionally long duration. In one of these cases the covenant runs for fifty years; in another, twenty-five years; in the third and fourth it is perpetual. It is a contract, moreover, which leaves no room for frequent reappraisals of the original decision to exclude members of the proscribed race but which tends to freeze for many years ahead a decision once made. A small minority, sometimes a single landowner, can continue to veto occupancy regardless of the present attitudes of the majority of those living in the covenanted area.

The prevalence of restrictive covenants is therefore a very dubious index of the active prejudices of those who own covenanted property. The ultimate vice of the covenant is that it generates evils which might not otherwise arise. Of recent years many sociologists and psychologists have concluded that the practice of discrimination often creates more prejudice than it reflects. See, for example, Watson, *Action for Unity* (Harpers, 1947); McWilliams, *Race Discrimination and the Law*, 9 Science and Society 1 (Winter, 1945). The process is self-regenerative. The undemocratic patterns of living which restrictive covenants establish and maintain breed new prejudices which, otherwise would never come to life.

Wholly aside from the indirect effect of discrimination in housing, we believe that the immediate impact on the individual of restrictive covenants, the state action which forbids him from occupying a home of his choice, is offensive to constitutional principles.

Certainly the right to obtain living space in the community, free of artificial restrictions based on race, color or religion, is as important as the rights of freedom of speech, press, religion and political activity which this Court has so jealously guarded. This is so both because of the inherent hostility of the Constitution to racial discrimination in any field and because of the fundamental importance of housing to the enjoyment of life and liberty. Indeed, other rights lose all significance where the right to the basic necessity of a place to live is denied.

Shortly after the adoption of the Thirteenth Amendment Congress recognized that the right to own land free of discrimination was a badge of the freedom which the Amendment was designed to secure. It provided that:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. (14 Stat. 27, R. S. Sec. 1978, 8 U. S. C. Sec. 42.)

This statute was reenacted (16 Stat. 144) after adoption of the Fourteenth Amendment.

This Court has recognized on more than one occasion that "Housing is a necessary of life." *Block* v. *Hirsh*, 256 U. S. 135, 156 (1921). This factor was held to be decisive in *Buchanan* v. *Warley, supra,* in disposing of the argument that the doctrine of *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), permitted regulations which left equal room for limitation on the use of land by Negroes and whites. Quoting with approval the decision of a State court in another case, this Court noted in the *Buchanan* case that where the "separate but equal" doctrine had been applied (245 U. S. at p. 80):

> In each instance the complaining person was afforded the opportunity to ride, or to attend institutions of learning, or afforded the thing of whatever nature to which in the particular case he was entitled. The most that was done was to require him as a member of a class to conform with reasonable rules in regard to the separation of the races. *In none of them was he denied the right to use, control, or dispose of his property,* as in this case. (Emphasis added.)
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> The effect of the ordinance under consideration was not merely to regulate a business or the like, but was to destroy the right of the individual to acquire, enjoy, and dispose of his property. Being of this character, it was void as being opposed to the due-process clause of the constitution.

The *Civil Rights Cases* leave the field clear for private owners of property to refuse to sell to any person or class of persons they deem objectionable. *Buchanan* v. *Warley,* on the other hand, prohibits the imposition of such restrictions by the State. Discrimination through enforcement of restrictive covenants is the worst of these three forms of racism.

The *simple refusal to sell or lease* can be terminated at any time by the will of the single property owner. As long as the discrimination retains this purely private nature, it can never have the restrictive effect which restrictive covenants seek. The law of supply and demand remains free at all times to work a change in the situation by persuading individual owners of greater benefits to be had by changing existing practices.

Even *direct State regulation,* if it were not prohibited, could only be invoked in the first place when the elected representatives of the people were persuaded that it was desirable.

The *restrictive covenant,* however, once imposed by private decision, cannot be changed for a long and sometimes indefinite period as long as a single land holder objects.

It remains in effect therefore regardless of the wishes of the majority, regardless of the pressure of economic and sociological changes,[18] and regardless even of the wishes of those who originally imposed it.

It is ironical that this Court's decision in *Buchanan* v. *Warley*, striking down discriminatory regulations emanating directly from the State, has led to resort to a far more effective device. A writer has recently commented:[19]

> The prevalence of these restrictions may perhaps be deemed a consequence of the ruling by the United States Supreme Court that ordinances and statutes providing for racial residential segregation are unconstitutional. Property owners have sought to accomplish the same result by private contract. They have done so, however, not only in southern States, but also in States where legislation of this character was never, *and probably never could have been, enacted.* (Emphasis added.)

We submit that no government subject to the restraints of our Constitution can hold that enforcement of the private whim of some of its citizens is justified in the face of the evils which enforcement of restrictive covenants are now known to generate.

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[18] States do, of course, recognize to some extent that covenants may become unenforceable because of changing circumstances. There is, however, no constitutional rule requiring them to do so and State policies in this respect are highly variable.

[19] Nassau, "Racial Restrictions on the Alienation and Use of Land", 21 Conn. Bar J., 123, 123-124 (1947).

CONCLUSION

The restrictive covenant is a pledge of future discrimination, "which is prejudice come to life" (Report of the President's Committee on Civil Rights, p. 135). The courts which enforce it compel acts of prejudice at a time when active prejudice has begun to weaken. It thereby casts over tomorrow the long shadows of the prejudices of yesterday and perpetuates indefinitely the system of segregation, overcrowding and social evils.

The decision of this Court in these cases will have a far greater geographical scope than the parcels of land under litigation. Restrictive covenants against all minorities have spread steadily and threaten to blanket urban and suburban areas throughout the country. This has been accomplished through a form of governmental edict at the instance of private individuals which is offensive to our democratic institutions.

Respectfully submitted,

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